COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2017/CLE/gen/00377

BETWEEN

DESMOND ANDREW DARVILLE

Plaintiff

-AND-

THE MINISTER RESPONSIBLE FOR EDUCATION SCIENCE & TECHNOLOGY

-AND-

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

Defendants

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mrs. Gail Lockhart-Charles KC with her Ms. Candice Knowles of Gail Lockhart Charles & Co. for the Plaintiff
Mrs. Luana Ingraham and Mr. David Whyms of the Office of the Attorney General for the Defendants

Hearing Dates: 26 January 2021, 27 January 2021, 28 January 2021, 10 March 2022

Negligence – Whether the Defendants owed a duty of care – Liability of employer – Employee injured in attack by students – Whether the damage was reasonably foreseeable – Whether employee entitled to damages – Health and Safety Work Act, 2002 – Costs

By Generally Indorsed Writ of Summons filed 23 May 2017 and Statement of Claim filed 22 February 2018, the Plaintiff, a teacher employed by the First Defendant at the S.C. McPherson Junior High School, sued the Defendants for damages for (i) negligence and/or breach of employment contract and (ii) breach of statutory duty to provide a safe system of work. The Plaintiff sustained injuries from an incident at the School where students threw bottles of liquids at him at lunch time.

The Defendants denied negligence and/or breach of the employment contract. They also denied having breached their statutory duty to ensure the health, safety and welfare at work of the Plaintiff and asserted that security protocols were adhered to and that the injury was occasioned by students and not the Defendants. Additionally, they alleged that the Plaintiff contributed to or aggravated the incident by engaging in a verbal row with students.

HELD: Finding that the Defendants are not liable for the personal injuries suffered by the Plaintiff, the claim is dismissed with each party to bear their own costs.

1. The question is not whether it was foreseeable that the students might behave badly, but the more specific question of whether it was foreseeable that they would harm a teacher: **Waugh v Newham London Borough Council** [2002] EWHC 802 QB distinguished.

2. Education authorities are not liable for all behaviour that results in accident and injury of teachers. Whether there was reasonable foreseeability such that the education authority could have taken steps to prevent the injury depends on the circumstances: **Moore v Kirklees Metropolitan Council** [1999] EWCA Civ J0430-29 distinguished. The case of **Roker v The Attorney General of The Commonwealth of The Bahamas** [2005] 6 BHS J. No. 410 relied upon.

JUDGMENT

Charles Snr J:

Introduction

[1] On Monday 30 May 2016, Grade 9 students of the S.C. McPherson Junior High School on Blue Hill Road South were sitting their Bahamas Junior Certificate Examination ("BJC"). The Plaintiff ("Mr. Darville"), a school teacher employed by the First Defendant (conveniently "the School") was present to invigilate two (2) exams on that day. He had already invigilated the morning session. He went to the lunch pavilion to purchase his lunch when he was attacked by a few students who threw bottles of liquid at him causing him to suffer serious injuries to his left shoulder.

[2] He later sued the Minister responsible for Education Science & Technology and the Attorney General of the Commonwealth of The Bahamas (collectively "the Defendants") claiming damages for negligence, breach of contract and/or breach of statutory and/or common law duty to ensure the health, safety and welfare at his place of work.

[3] The crux of Mr. Darville's claim is that the Defendants acted negligently and/or in breach of his contract of employment and/or in breach of their statutory duty under the Health and Safety at Work Act, 2002, Chapter 321C ("the Act") by failing to take all reasonable precautions to ensure his safety in the course of his employment and to maintain a working environment for its employees, including him, that was reasonably practicable, safe, without risks to health and adequate as regards facilities and arrangements for his welfare at work.

[4] The Defendants filed their Defence on 1 August 2018 which was amended on 31 August 2020. They denied that they were negligent and/or breached the employment contract and/or their statutory duty which is owed to Mr. Darville. They asserted that security protocols were adhered to and the injury was occasioned by two (2) students and not the Defendants. Additionally, the Defendants alleged that Mr. Darville contributed to or aggravated the incident by engaging in a verbal row with students.

[5] However, the Defendants do not dispute that they owed Mr. Darville a duty (both statutory and at common law) to provide a safe system of work. Their defence is that it was not reasonably foreseeable that the students would have attacked Mr. Darville and there is no causal link between the alleged breach of the Defendants (failing to have security closer to the pavilion) and the damage (being attacked by students).

The evidence

[6] Mr. Darville gave evidence on his own behalf and called Pamela Moss and Karen Bell, both of whom were teachers at the School at the material time. He also subpoenaed the lunch vendor, Nioshi Symonette who witnessed the attack on him. Additionally, Mr. Darville called Dr. Timothy Barrett and Dr. Robert Gibson, whose testimonies are relevant to the assessment of damages, but not establishing liability.

[7] Annette Farquharson, former principal of S.C. McPherson Junior High School, gave evidence for the Defendants.

Desmond Darville

[8] Mr. Darville's evidence in chief is contained in his Witness Statement filed 28 May 2020 which stood as his evidence at trial.

[9] He testified that, on 30 May 2016, during his scheduled lunch break, he had purchased lunch from a lunch vendor in the lunch pavilion. Upon leaving the lunch pavilion, a plastic Nestle bottle of water was thrown in his direction as he walked down the stairs. Initially, he thought it was a mistake so he continued walking. As he stepped down the staircase exiting the pavilion, he felt a wet sensation on his back. He realized that the students were throwing bottles of water at him. He said that, at the same time, one of the lunch vendors yelled "watch out Darville". He turned around in shock and, at that time, he was struck with a half frozen bottle of Tampico juice on his left shoulder. The Tampico bottle burst on impact. Mr. Darville said that he was shocked and speechless. He looked around in search of somewhere to run. Every time he tried to escape, the students lifted up their hands as if they were going to throw something at him again. He said that, as he could not see any safe place to run, he started walking backwards while facing the students.

[10] Once he arrived at a safe distance from the lunch pavilion area, a group of students who were on the veranda of the pavilion, continued verbally assaulting him, shouting "*Big Sissy" "Burst him*" and "*Hit him"*. He said that they continued to throw bottles of liquid at him as he ran to the administration building for help.

[11] Mr. Darville testified that there was no one on patrol in the lunch pavilion area. At the Administration Building, he met Ms. Forbes and Mrs. Henfield. He spoke to Ms. Forbes who told him that there were no administrators in the office to assist. He said that he pleaded with her to call an administrator. He told her that he was attacked by the students and that bottles were thrown at him.

[12] He then went to seek medical attention at Agape Medical Centre on Collins Avenue. He saw Dr. Bevans who examined him and said that she suspected that his shoulder was fractured so she sent him for an x-ray. Dr. Bevans wrote a sick certificate for two days and referred him to Princess Margaret Hospital ("PMH"). She also advised him to make a report to the police.

[13] He went to Accident and Emergency ("A&E") at PMH where an x-ray was done. He waited for the x-ray to take back to Dr. Bevans. He also made a report to the Carmichael Police Station.

[14] Mr. Darville said that he was in extreme pain throughout the night and it was difficult for him to sleep. He went back to Agape Medical Clinic and saw Dr. Bevans who confirmed that he had a fractured left clavicle. He was then referred to the Orthopedic Clinic but since they had no available date until August 2016, he made an appointment to see Dr. Dane Bowe. Dr. Bowe examined him and prescribed medication and gave him another sick certificate from 8 -12 June 2016.

[15] Mr. Darville made an application to National Insurance for industrial injury on the job. He was advised that it could not be processed until a report from the School along with a B-44 Form was submitted. He called the School repeatedly requesting the Report. He finally received it along with the B-44 Form on 28 June 2016. He was asked by National Insurance to select an approved physician and he opted for Dr. Gibson. He saw Dr. Gibson on 5 July 2016 and, after consultation, Dr. Gibson prescribed pain killers and therapy. He underwent 12 sessions of therapy. His shoulder was still painful to the touch.

[16] On 12 August 2016, Dr. Gibson performed Arthroscopy surgery on his left shoulder. After the surgery, he continued to experience the pulsing pain. After a follow-up appointment with Dr. Gibson, he was referred to an additional twelve sessions of physiotherapy.

[17] Despite the physiotherapy, Mr. Darville said that he continued to experience pain and weakness in his left shoulder and arm. Dr. Gibson then referred him to see Dr.

Janice Victor who did four sessions with him. The sessions entailed Fluoroscopic injections under anaesthesia. It provided temporary relief from the pain for one month intervals between treatment sessions. Dr. Victor left the country and never returned. He then attended Dr. Christian Allen at Spectrum Pain Management. He examined his left shoulder and arm. He prescribed more physiotherapy and medication.

[18] Still experiencing pain, Mr. Darville returned to Dr. Gibson who referred him to the University of Miami Hospital on 18 April 2019. At that hospital, he saw Dr. Danielle Horn. She examined him and administered a nerve block injection to his left shoulder. According to him, Dr. Horn informed him that he was a good candidate for Slim Wave Implant procedure to stimulate the nerves in the shoulder. Dr. Horn prescribed more physiotherapy and medication. Due to financial constraints, he was unable to follow up with the implant procedure.

[19] Mr. Darville explained that, prior to his injury, he supplemented his income by teaching evening art classes at Sip N Paint, draping for special functions, teaching and selling pottery, creating costume designs for carnival and junkanoo along with freelance interior decorating. He stated that these extra-curricular activities involved dexterity and use of his arms. He is unable to perform in any of these capacities.

[20] Mr. Darville stated that, since the injuries, he has suffered physically, emotionally and financially. He is now a burden to his family and friends who have housed and assisted him financially. Additionally, he is frustrated that his life has been consumed with managing the pain in his shoulder and feeling like a trespasser in his family and friends' homes.

[21] Under cross-examination by Ms. Ingraham, who appeared as Counsel for the Defendants, Mr. Darville stated that he taught roughly 90 students weekly in addition to the homeroom class that he had which had approximately 30 students. However, since his homeroom is disbursed between the different classes and the

different options which they choose, he would come into contact with approximately 100 students weekly.

[22] Mr. Darville said he never had any arguments with any of students and he always reported "*disrespect*" to administration but he did not recall if he ever made any reports to administration about any threatening behaviour by students. He agreed with Ms. Ingraham that he enjoyed a peaceful existence at the School until the incident. He said that as he was leaving the lunch vendor's window, he saw a bottle landed in front of him. He thought nothing of it. He thought it was a mistake so he continued walking with his lunch in his hand.

[23] Mr. Darville stated that he purchased lunch from the pavilion practically every day and it was the first time that an incident ever occurred between him and students. He testified that, on the day of the incident, he did not feel threatened while on his way to get lunch. There were approximately 30 students gathered in the area where the attack took place.

[24] He further testified that as the students were throwing bottles at him, they were also hurling acerbic slurs like "*burst his sissy ass; he been dancing in carnival in a bikini*."

[25] Mr. Darville further stated that it is customary for security officers and administrators to be in any area where there is a large gathering of students. He does not berate his students. If he has problems with his students, he sends them to the office. He said that the only time he has problems with students is when they fail to bring coursework on time, in which case he sends them to the office.

[26] Under re-examination, he stated that there is a history of violence at the School and other teachers have been assaulted with bottles. He said they have a "*fight day*". The students would go around saying "*Oh, it's fight day today*" and teachers are extra vigilant because they have been hit with items. He said that there is no training for such threats.

Pamela Moss

[27] Ms. Moss was an English teacher at the School at the material time. She filed a Witness Statement on 28 May 2020 which stood as her evidence in chief at trial. She stated that she was also the Assistant Shop Stewart for the Bahamas Union of Teachers for about 3 years. She stated, at paragraph 5 of her Witness Statement, that she made the Witness Statement in *"my capacity as Assistant Shop Stewart to give an account of my knowledge of the incident that took place on school premises on 30th May 2016 when Mr. Desmond Darville … was injured on the school campus."*

[28] Ms. Moss said that "*on the day of the incident, I briefly spoke with Desmond Darville. He informed me that he had been attacked by the students and that the Principal Mrs. Farquharson told him to go to the clinic for medical assistance."* As one analyses her witness statement, it consists almost entirely on hearsay. Essentially, it is a "*post mortem*" of what took place after the incident. It is therefore very unhelpful.

[29] Under cross-examination by Ms. Ingraham, Ms. Moss was asked whether there is an expectation that there would be security to monitor the thirty students who were under the pavilion. She did not directly answer the question. Instead, she said "*I would have taken the normal route and just monitor the students. But I am thinking that because there was a reduction in students, that security and administration felt that, okay, these are ninth graders, they are seniors, they are responsible, so we don't need to pay as much attention. And so, that is probably why this incident was given a little leeway*."

Karen Bell

[30] Ms. Bell, who was also a teacher at the School at the material time, filed a Witness Statement on 28 May 2020 which stood as her evidence in chief at trial. Her evidence also consists largely of hearsay and was also limited to what occurred after the incident.

Nioshi Symonette

[31] Ms. Symonette was subpoenaed by the Court. She is a lunch vendor at S.C. McPherson High School and has been so for about 11 to 12 years.

[32] Ms. Symonette witnessed the attack on Mr. Darville. She testified that the incident occurred on a day of BJC examinations. There were roughly 20 to 30 students to her right in a corner. Mr. Darville came up to her stall to buy lunch, as he usually does. As he was leaving, she saw the students starting to stone him with water bottles. She remembered that one of the bottles was full and burst upon hitting him.

[33] Ms. Symonette stated that, before the incident, there was no supervision of students gathered in the pavilion in large numbers. Since then, however, they have made it mandatory that one or two security guards are there before students go.

[34] She described the pavilion as a "*hot spot*" for deviance. She said that she had previously witnessed students smoking, selling drugs, students and adults jumping over the gate and weapons being passed. She has also witnessed a security guard as well as a student being attacked and adult males having sex with two children in one of the vendor stalls. According to her, the students lit a stall on fire and have broken into the stalls to steal knives. The police have had to be called in the past. She said she expects four to five fights every day.

[35] Ms. Symonette further stated that security is usually on the outskirts of the School, which is two to three minutes away but not in the lunch pavilion. She said that "*normally when anything happens up there say anything happen you will see security run in that particular area because we carry from 1200, 1600 children every School year. And they can be everywhere. But I mean for that particular area there is like a hot spot so I think someone should be there always*."

[36] Save for Mr. Darville's incident, Ms. Symonette stated that she is aware of one other attack by students on a teacher.

[37] Under cross-examination by Ms. Ingraham, Ms. Symonette said that students often made '*snarky*' remarks about Mr. Darville when he comes to get his lunch. A few days before the incident, she recalled that the students were saying that he wore a dress at Junior Junkanoo and they were corrected for same by an administrator. She added that the students do make 'snarky' remarks about other persons when they would get their lunch.

[38] She said that violence was predictable in the area of the lunch pavilion.

Annette Farquharson

[39] Ms. Farquharson filed a Witness Statement on 25 October 2020 which stood as her evidence in chief at trial. She testified that she is currently the Superintendent of the Northern New Providence Secondary District at the Ministry of Education. She was the principal of S.C. McPherson Junior High School at the material time. She held that position for nine (9) years. Ms. Farquharson did not witness the incident.

[40] According to her, it is the School's practice to always have security officers present during lunch or break who are to intervene as necessary. Administrators and security personnel are strategically placed around the School. Under normal circumstances where all students are on campus, security and administrators are required to be at their assigned areas before the bell rings for break or for lunch. She stated that, on the day of the incident, the only students present at School were ninth grade students who were sitting national exams. She said at the time of the incident, only one class was on lunch break.

[41] Under cross-examination by Mrs. Lockhart-Charles KC, who appeared for Mr. Darville, she testified that there was no security personnel present in the pavilion area at the time of the incident. That was because security was assisting administration to move the students out of the exam area, which they had to do pursuant to national exam protocol. As a result, the security officer who ought to have been on the pavilion was five to seven minutes late. However, she also stated

that there was no security on the pavilion at that time because they did not believe that the risk was high since there were so few students.

[42] Ms. Farquharson said that, based on the investigation of administration, the incident was spontaneous. They did not have any perceived indication that something was planned. She explained that "*If you know children or students, once something is planned, someone will come and whisper something to you so that you can actually start some intervention long before. So this was something that seems to have been from our investigation, something that happened spontaneously*."

[43] Ms. Farquharson acknowledged that fights do occur but they do not happen exclusively in the pavilion area. She has seen children throw bottles on "*one or two occasions*."

[44] Assessing the evidence of the witnesses, I found all of them to be frank and forthright.

Issues arising

[45] The following issues arise for consideration namely:

1. Whether it was reasonably foreseeable that Mr. Darville would be attacked and;

2. Whether the attack on Mr. Darville would have been prevented if the School had security closer to the pavilion.

The law

[46] The Health and Safety at Work Act, 2002 prescribes the duty of employers with regard to safety at the workplace. Section 4 (1) provides that:

> **"It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees."**

Discussion

[47] Mrs. Lockhart-Charles KC correctly stated that it is well-established that the employer is liable for injuries and attacks that are reasonably foreseeable. She submitted that the School's failure to provide security at the pavilion (which she emphasised was a "hot spot") was negligent and amounted to a breach of the Defendants' obligation to provide a safe work environment.

[48] Mrs. Lockhart-Charles urged the Court to draw the inference that the attack was reasonably foreseeable since the area in which it occurred was a place where there ought to have been security present as a result of the many negative things that occurred there. However, I agree with Ms. Ingraham that the attack on Mr. Darville was not reasonably foreseeable.

[49] It is trite that to successfully prove a negligence cause of action, the plaintiff must prove that the defendant acted negligently and that such negligence caused the plaintiff's damage. The plaintiff bears the burden of proving that (i) the defendant owed him a duty of care, (ii) that duty was breached and (iii) such breach caused the damage. It follows that it is not in every accident that a defendant may be negligent. As such, not every accident is actionable in negligence. As Lord Wright explained in **Lochgelly Iron and Coal Co. Ltd. v John McMullan** [1934] AC 1 at p. 25:

> **"…in strict legal analysis, "negligence" means more than heedless or careless conduct whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."**

[50] In determining whether there is an arguable duty of care, the Court should have regard to the three-fold test of "*foreseeability, proximity and "fair, just and reasonable*"" as Lord Bridge puts it in **Caparo Industries Plc v Dickman** [1990] 2 AC 605 at pages 617-618:

> **"…What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing that duty and the**

> **party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon one party for the benefit of the other…."**

[51] In submitting that the damage was reasonably foreseeable, Mrs. Lockhart-Charles relied heavily on the evidence of Ms. Symonette. However, her evidence was that the mischief that occurred at the lunch pavilion was between students. The question is not whether it was foreseeable that the students might behave badly but the more specific question is whether it was foreseeable that they would harm Mr. Darville. Accordingly, the bad behaviour between the students is not probative for proving that the attack by students on Mr. Darville, a teacher, was reasonably foreseeable.

[52] Mr. Darville's own evidence was that he was never fearful for his safety and, more importantly, that he never reported same and he had no significant issues with students in the past. Save for Mr. Darville's attack, Ms. Symonette said that, in her twelve (12) years as a lunch vendor at the School, she witnessed only one attack on a teacher by a student which occurred towards the back of the School.

[53] There was no evidence that the Defendants and, specifically, the School, knew about the video before the incident. Had they known about it, they might have been able to anticipate that Mr. Darville might have been taunted and, perhaps, injured by students. This can be distinguished from **Waugh v Newham London Borough Council** [2002] EWHC 802 QB, a case cited by Mrs. Lockhart-Charles. In that case, a teacher sued her employers, the Council, for injuries which she sustained as a result of an attack on her by a special needs student, who was known to be dangerous. The Court agreed with the plaintiff that the school had been negligent by not giving his escort sufficient information regarding the student's needs and the best ways to mitigate harm. Therefore, in that case, the foreseeability of the attack was obvious: the student had special needs (which the School was aware of) and a history of incidents. It followed that it was foreseeable that he might harm others if his escort did not have the information to effectively prevent or mitigate such harm.

[54] In **Moore v Kirklees Metropolitan Council** [1999] EWCA Civ J0430-29, another case relied on by Mrs. Lockhart-Charles, the question for the Court of Appeal was whether the Council/School could have taken steps to prevent the injury of a dinner lady who was on supervision duty of the playground. As she was lining the students for lunch, student A, a 10 year old child, jumped on her back as he was coming down the steps of the dining hall. She fell and injured her back. In finding that the Council was negligent, Peter Gibson LJ's reasoning was that it would have been appropriate for the dinner ladies to be notified of A's behaviour and his special needs. Although the Plaintiff knew that A was naughty, she did not know that he had the propensity to jump on people's backs. The behaviour of A of jumping on people's backs was known by members of staff. The speech of Peter Gibson LJ spoke to foreseeability and the factors relevant to determining whether education authorities are liable for playful behaviour by children. Education authorities are not liable for all behaviour that results in accident and injury:

> **"The present case, it seems to me, is quite different on its facts from Mullin v Richards and every other case to which our attention was drawn. I would emphasise, as did the Recorder, that this case turns on its own particular facts. To hold the Council liable in the present case does not mean that ordinary playful behaviour by children in a School playground which leads to accident and injury will bring liability on an education authority. Nor does it mean that children with special needs can never safely be placed in an ordinary School. But it does mean that in accordance with ordinary principles in the law of negligence where dangerous behaviour is known to the School to occur and it is also known that such behaviour has caused previous injury and could well cause future injury, not as a remote possibility but as a real likelihood, reasonable steps must be taken by the local authority in the performance of its duty of care to minimise the danger. Putting it the other way round, how can it be right that an employee to whom a local authority owes a duty of care should be left without remedy when injured in the course of her employment as a result of dangerous behaviour by a child, whom the authority is under a duty to supervise, and who is known to be indulging in dangerous behaviour, when the employee has not been advised how to cope with that behaviour, who has not been made aware of the danger and when no steps have been taken by the authority to prevent a recurrence of that behaviour? The authority's own witness, Mrs Dick, had accepted that it would have been preferable for there to have been another person in the playground at the relevant time. Even that modest step was not taken although the evidence was that at other times there were two supervisors on duty in the playground.**

> **In my judgment the Recorder was quite right to find that the accident could have been prevented if appropriate steps which could have been taken had been taken, and she was also correct to find the Council liable."** [Emphasis added]

[55] In **Roker v The Attorney General of The Commonwealth of The Bahamas** [2005] 6 BHS J. No. 410, a case cited by Ms. Ingraham, the plaintiff, a teacher at a school, was attacked by students, on the school grounds. The plaintiff claimed, against the defendant, for damages for personal injuries suffered in the attack and for breach of statutory duty. She further alleged that the attack was caused by the defendant's breach of duty to provide a safe and secure system of work. At para 35, Longley J had this to say:

> **"On the evidence, can it be said that it was reasonably foreseeable that the two students would attack the plaintiff, a teacher and inflict the type injury that she suffered. *I would say that it was not reasonably foreseeable*. It seems to me that the distinguishing feature between this case and the cases referred to by the plaintiff, is that there was clearly established precedent for the authorities to take action. There is no evidence before me that either of these students ever attacked a teacher or caused injury of any type to anyone, and indeed in the majority of the cases where Niquel was involved in a fight she does not appear to have been the aggressor. What emerges from the evidence is that, contrary to the pleadings, the two students were disciplined and penalized on many occasions. They did not get away with conduct which was not tolerated by the school or the school code. The penalties ranged from caning to suspensions. Removal or expulsion was not an option. The law did not countenance that. So even if each girl was taken separately and one were to ask if it was reasonably foreseeable that she would attack the teacher and inflict the type injury suffered by Mrs. Roker I am compelled on the evidence to answer that question in the negative. The evidence to my mind does not permit me to draw the inference that there was likelihood that these students would attack a teacher. Not even the plaintiff held that view of Niquel; and that was shared by others in authority who knew her well. That to my mind is a significant fact. The facts and circumstances in this case are to be contrasted with those cases cited by the plaintiff in support of her claim. In each of those cases there was a clearly established propensity of the child or student not only to conduct him or herself in the same way that resulted in the injury but to do it in relation to the person in authority' and there was prior evidence of injury to other persons. Those factors are clearly absent here. In those cases there was a clear duty to take**

steps to protect the staff in discharge of the duty of care to provide a safe and secure environment. [Emphasis added]

[56] No doubt, each case will turn on its own peculiar facts and circumstances. In the present case, there was no history of attacks on teachers save for the attack by other students on Mr. Simmons, which did not occur at lunch time or, at the pavilion, yet the negligence alleged by Mr. Darville is the School's failure to have security on the pavilion. Violence between students and deviant behaviour seem to be a regular occurrence at the School. However, there was no evidence that gave rise to foreseeability of an attack on a teacher at lunch time, especially since Mr. Darville got lunch at the pavilion almost every day and (as had other teachers) been made fun of in the past by students as he was getting his lunch. I accept Ms. Symonette's evidence that Mr. Darville had, in the past, even been made fun of by the students for what they perceived to be his cross dressing. No attack resulted therefrom prior to this incident.

[57] Mrs. Lockhart-Charles relied on the Southeastern District Evaluation Report in the "Principal's Desk Report" dated 4 April 2016. The Evaluation Report identified seven (7) areas with recommendations for improvement. In particular, Mrs. Lockhart-Charles drew the Court's attention to the observation with respect to security officers: "*Security Officers: Not visible, did not greet persons at the front gate, were not patrolling the campus*". The Report does not, however, assist her in proving that the attack on Mr. Darville was reasonably foreseeable. The reliance on the Evaluation Report seems to be that the failures of the security officers had been identified prior to the incident and that, somehow, this made the attack on Mr. Darville foreseeable as a result of the breach alleged: failure to have security on the pavilion. Preliminarily, however, the breach/failure by the School alleged by Mr. Darville is different from that identified in the Evaluation Report. The Report stated that security should be visible and patrol the campus. It did not identify the need for security officers immediately on the pavilion, which is the breach that Mr. Darville averred to. In any event, the Report does no more than prove that, on the date of the incident, the School had already identified the need for security and that, on the date of the incident, it failed to comply with its own policy.

[58] In establishing negligence and breach of statutory duty, however, the question is not whether the School complied with its policies, but whether it was reasonably foreseeable. Had the Report stated that the supervision of the students was necessary for the protection of teachers from their attacks, then the Report would have been probative in establishing reasonable foreseeability because the contemplation of the risk would have been evident. However, the Report does not state this.

[59] Further and, in any event, I agree with Ms. Ingraham that the Evaluation Report was no more than a reminder to all of the Schools in the Southern Division to comply with certain practices based on visits to those schools.

[60] With respect to the need for supervision of the students on the day of the incident, Ms. Farquharson's evidence was somewhat conflicting. On the one hand, she stated that the security personnel were late to the pavilion because they were assisting administration with the students and, on the other hand, she intimated that administration did not believe the group needed to be supervised since there were only 20 to 30 students on lunch break. Notwithstanding that inconsistency, I found Ms. Farquharson to be a credible witness. I agree with Ms. Ingraham that the lack of supervision is far more excusable since the student population on that day was small. True, there should be security on the pavilion itself to address the other deviant and illegal activity enumerated by Ms. Symonette but that is not the damage complained of. The breach must have caused the damage complained of.

[61] In any event, there was security sufficiently close to the pavilion. Ms. Symonette's evidence is that they were stationed some distance away, on the outskirts, and they would run over when needed, which could take up to two (2) minutes.

[62] As Mr. Darville failed to prove that the attack was reasonably foreseeable, the Defendants cannot be liable for his injuries. His claim is therefore dismissed. The Defendants' assertion that the School could not be vicariously liable for the actions of the students and its assertion of contributory negligence both fall away.

Damages

[63] Given my findings, the issue of damages does not arise for consideration.

Costs

[64] In civil proceedings, costs are always discretionary. A good starting point is Order 59, rule 3(2) of the Rules of the Supreme Court ("RSC") which states:

> "**If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.**"

[65] Then, section 30(1) of the Supreme Court Act provides:

> "**Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.**"

[80] Order 59, rule 2(2) of the RSC similarly reads:

> "**The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order.**"[Emphasis added]

[66] As a general rule, the successful party, as in this case, the Defendants, are entitled to their costs. But that does not preclude a judge from departing from this normal practice. However, I am duty bound to give reasons for any departure: see **Eagil Trust Co Ltd v Pigott-Brown and Another** [1985] 3 All ER 119 at 122 - per Griffiths LJ.

[67] I am of the considered opinion that since Mr. Darville suffered injuries and a traumatic experience at work, the claim was not frivolous or vexatious. He brought it in good faith. He should not be condemned in costs.

Conclusion

[68] The Order of this Court is:

1. The action is dismissed.

2. Each party will bear their own costs.

Dated this 9th day of September, 2022

Indra H. Charles
Senior Justice